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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 68.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

MICHIGAN RAILROAD COMMISSION AND
FLETCHER PAPER COMPANY,
DEFENDANTS IN ERROR.

REPLY BRIEF FOR DEFENDANT IN ERROR MICHIGAN RAILROAD COMMISSION.

GRANT FELLOWS,
Attorney General of Michigan;
DAVID H. CROWLEY,
Assistant Attorney General of Michigan,
Counsel for Defendant in Error
Michigan Railroad Commission.

(24,053)

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Plaintiff in error contends that the Supreme Court of Michigan, in granting the mandamus in question, violated the provisions of the Fourteenth Amendment to the Constitution of the United States, in that the judgment of the court constituted a taking of the property of plaintiff in error without due process of law, and bases its contention in this respect, in the main, upon two grounds;

First. That the order of the Michigan Railroad Commission was made without notice to plaintiff in error and without an opportunity for hearing, and was consequently void.

Second. That even if the said order had been based upon a full and fair hearing, yet it was not competent for the Supreme Court of the State to grant a mandamus putting such order into full force and effect while the proceeding to review same was still pending in the Circuit Court for the County of Wayne, in chancery, and undecided.

We address ourselves, very briefly, with respect to these contentions in the order set forth.

I.

Plaintiff in error cites the case of Coe *vs.* Armour Fertilizer Works, 237 U. S., 413, and contends that the rule respecting notice and hearing there laid down is directly applicable to the instant case. From an examination of that case it appears that the controversy arose under a statute of the State of Florida allowing execution to issue against a stockholder of a corporation without notice or hearing after an execution upon a judgment against the corporation had been returned unsatisfied. Under the provisions of the statute the Fertilizer Company levied upon a parcel of land belonging to Coe, a stockholder, who then filed in the circuit court a petition to quash the execution as illegally issued, alleging that it had been issued without notice to him and amounted to the taking of his property without due process of law and that the statute permitting the same was repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment. The matter finally reached the Supreme Court of Florida, where a judgment of the circuit court denying a motion to quash was affirmed. The case was then brought to this court upon writ of error, and the judgment of the Supreme Court of Florida was reversed, this court saying, at page 423:

> "But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription he is entitled, upon the most

> fundamental principles, to a day in court, and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

The facts in the case above cited are in no wise similar to those in the case at bar, and the principles applicable to those facts cannot be urged as controlling in the instant matter. In the Coe case there was no preliminary notice to the party to be charged; in the instant case such notice is not questioned. In the Coe case there was no hearing; in the instant matter there was at least one hearing. In the Coe case the plaintiff in error had no day in court; in this case plaintiff in error did. In the Coe case a judgment under which the levy was made was entered without any facts before the court justifying a finding of individual responsibility; in the instant matter all of the facts which had been presented in defense of the same issue before the Alpena Circuit Court, in chancery, were before the commission. No claim is made by plaintiff in error that the Railroad Commission had not in a proper manner acquired jurisdiction of the parties. The most that can be claimed is, that an opportunity was not afforded to put in more testimony than that offered at the hearing. When the matter was heard before the Railroad Commission counsel for plaintiff in error did not announce that further hearing was desired if the demurrer was overruled. Counsel at at that time stated, "they will notify me if we desire to put in proof, either to put it in or not to put it in" (Record, page 54). With reference to this the Supreme Court of Michigan, on the hearing for mandamus, found that plaintiff in error had been deprived of no substantial right nor denied an opportunity to be heard. The court said, with reference to this claim:

> "The record indicates that such an undertaking was had, but it is denied in the brief of counsel for petitioner that no notice or opportunity was given

to respondent to furnish proofs in the case, and no such claim appears to have been made to the commission after the order was promulgated and before the bill to review the order was filed. The respondent at no time has presented any statement of merits which it could show by such proofs, or that in fact it expected and desired to put in further or other proofs and exhibits than are shown by the testimony returned in the record.

"Further, the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission. Admitting the truth of its contention, it is apparent that no injury to defendant has been done in the neglect to notify it according to agreement" (Record, page 72).

Judge Cooley in his work on Constitutional Limitations states the rule to be that—

"When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding, which, conformable with the practice of the court, ought to have been observed in the case, and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceeding or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellant court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say in any other

suit than that in which the irregularity occurs, or on appeal, or process in error therefrom."

Cooley Constitutional Limitations, 7th edition, pages 587-588.

White *vs.* Crow, 110 U. S., 183, involved a state of facts where, in a suit against a corporation, process was served in the State upon an agent who was a stockholder and authorized to receive service. He appeared and consented to judgment being entered against the corporation before the return date. "The service was regular." "The court therefore had jurisdiction of the parties. It had jurisdiction of the subject-matter and the judgment which it rendered was within the jurisdiction conferred upon it by law * * *. The law, therefore, when the judgment is questioned, presumes that the court was satisfied with the proof that * * * the agent had authority. * * * but * * * the question arises whether the rendition of the judgment before the time for filing defendant's answer had expired renders the judgment void? We are of the opinion that it does not; that its rendition was simply erroneous, nothing more. The court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumption necessary to sustain it. * * * The defendant being in court was bound to take notice of its proceedings and might have corrected the error at any time during term. It did not move to set aside the judgment; it filed no answer. The presumption, therefore, which the law makes is either that it consented to a submission of the case before the time for answer expired or that it subsequently waived the error by not seeking to correct it."

Lent *vs.* Tillson, 140 U. S., 316:

This case involved a street-widening proceeding in the city of San Francisco. The notice and hearing was provided for by statute. A proceeding was provided whereby

parties could petition, etc. Complaint was made that the act was so administered that it resulted in depriving the plaintiffs of their property without due process of law. The court said:

> "But errors in the mere administration of the statute, not involving jurisdiction of the subject and the parties, could not justify this court in a re-examination of the judgment of the State Court, to hold that the State had deprived the plaintiffs of their property without due process of law."

The facts and conclusions of the above cases are not set out for the purpose of maintaining that the order in question of the Railroad Commission was being questioned in a collateral proceeding, although it cannot be claimed that the mandamus proceeding was a direct review of the order of the commission; but such facts and conclusions are set forth for the purpose of indicating that the order of the Michigan Railroad Commission could not, even if viewed from the standpoint of plaintiff in error, be considered void, as claimed by plaintiff in error (Reply Brief of Plaintiff in Error, page 10), and hence could not be within the rule laid down in Coe *vs.* Armour Fertilizer Works, cited and relied on by plaintiff in error.

The necessary rules of procedure, above referred to, namely, notice, hearing, etc., and the distinction between those errors that render a judgment void and those resulting simply in irregular procedure, have been pointed out many times by this court in reviewing judgment of State courts. The rules of procedure should be construed even more liberally when applied to the Michigan Railroad Commission, whose proceedings are administrative or ministerial and not judicial (Michigan Central Railroad Company *vs.* Michigan Railroad Commission, 160 Mich., 355). And, again, the findings of the said commission are not, under

the Michigan statutes, conclusive, but are only *prima facie* until modified by the commission or set aside by the court.

Michigan Railroad Commission *vs.* Michigan Central Railroad Company, 159 Mich., 580.

D. & M. Railroad Company *vs.* Railroad Commission, 171 Mich., 335-346.

The remedy of one aggrieved by the order of the commission is not by appeal, but by bill to review filed in any circuit court in chancery (Plaintiff in Error's Principal Brief, page 26). Neither is the order of the commission self-executing. It may only be enforced by the mandate of the court (Reply Brief for Plaintiff in Error, page 12).

The Supreme Court of Michigan held, after an examination of the facts, that—

> "No injury to defendant has been done in the neglect to notify it according to agreement,"

and that

> "the answer of respondent admits all of the material facts charged against it in the petition upon which petitioner relies for the relief asked of the Railroad Commission."
>
> **Record, page 72.**

II.

Counsel for plaintiff in error contends that by putting the order of the Railroad Commission into effect before a judicial determination of its validity on the facts the Supreme Court of Michigan deprived plaintiff in error of its property without due process of law, and reasons that, inasmuch as the proceedings before the commission are administrative in character, the requirement of due process of law has not been fully complied with until a hearing in court, with respect to an order made, has been held (Plaintiff in Error's Reply Brief, page 11).

We are unable to follow the reason of counsel wherein a distinction is attempted to be made between a hearing before a commission and one before a court. We admit that the Michigan statute permits and authorizes a judicial review of an order of the commission, and that questions in issue should not ordinarily be foreclosed until such review has been had, but in this respect the rule would be the same on appeal from the judgment of a lower court. The orders of the Michigan Railroad Commission, as before stated, are not self-executing. Hence there must be a judicial determination as to the validity of the order before the same may be put into effect. Plaintiff in error has not been foreclosed upon the facts in issue by the judgment of the Supreme Court of Michigan in the mandamus proceeding, for the reason that the Supreme Court of Michigan recognized the pendency of the case then pending in the Circuit Court of the County of Wayne, in chancery, and refused, for this reason, to consider or determine the merits of the controversy existing (Record, page 73), and issued the mandamus upon the record made in the mandamus proceeding.

As a general rule, mandamus will not lie where another suit involving the same subject-matter is pending, but this rule does not apply where the pending litigation will be ineffective or where irreparable loss or damage will result from delay. Thus it has been held that mandamus would lie to secure the right to sell, upon execution, land in the possession of a receiver, although a proceeding was pending to set the judgment aside, where otherwise the security of the judgment creditor would be destroyed.

> Petaluma Savings Bank *vs.* San Francisco Superior Court, 111 California, 488; 44 Pacific, 177.

In Southern Pac. Co. *vs.* Siemens, county treasurer (Supreme Court of Oregon), 150 Pac. Rep., 290, the plaintiff was the owner of a large amount of taxable real property in Klamath County and a small amount of personal property. The true amount of taxes to be collected for the year 1912

upon such personal property was $179.95. The decimal point was unintentionally omitted by the assessor, and the error was not noted by plaintiff, who consequently paid $17,995, less 3 per cent discount. A month later the error was noted and demand made for return of the difference. County had expended the money and so issued warrants for the amount of overpayment, namely, $17,280.45. Suit in equity to enjoin payment of warrants was then commenced in the Circuit Court for the County of Klamath by a certain individual, naming his defendants the collector, treasurer, and plaintiff, alleging that payment of warrants would increase the voluntary indebtedness of the county to an amount in excess of that permitted by the State constitution and that consequently the warrants were void. A similar suit was begun by another party in the United States District Court for the District of Oregon to restrain payment of the warrants. Plaintiff owed taxes for the year 1913 on its entire property, amounting to $23,193.14, and attempted to pay such taxes by tendering to the collector $12,793.24 cash and two of the warrants, amounting with interest to $10,400. The offer was refused. Upon petition of plaintiff mandamus was directed to the defendant, commanding him to accept the cash and warrants tendered or to show cause for refusal. Demurrer to the writ was overruled. Defendant filed plea in abatement, showing the pendency of the suit in equity, alleging that a determination of the suit in equity would be decisive of the controversy. Demurrer to this plea in abatement was sustained and an answer was then interposed, alleging, among other things, the pendency of the two suits. Demurrer to the answer was sustained, and defendant declining to further plead judgment was rendered commanding an acceptance of the cash and warrants. Appeal to the Supreme Court was then taken, and in affirming the judgment of the lower court the Supreme Court said, with reference to this matter:

> "The remaining assignment of error arises out of the ruling of the trial judge who held that the litigation pending in the Circuit Court for Klamath County and in the District Court of the United States for the District of Oregon did not necessarily abate mandamus proceeding. The suits in equity were prosecuted upon the theory that the warrants held by plaintiff and others are unconstitutional and void * * *. Decrees in the suits in equity declaring the validity of the warrants would afford some of the relief, but not all, sought by the writ of mandamus because the decrees would proceed no further than to determine the worth of the warrants. If the paper is void the county would be enjoined from paying. If the warrants are valid the decrees would so declare, but in such event plaintiff would still be obliged to call for the aid of a writ of mandamus if the County Treasurer should continue to refuse to accept the tendered warrants. All the relief sought by mandamus cannot be obtained in the suits in equity. There is also a difference in the character of the relief asked for. The suits will not result in a complete adjudication of the questions involved and consequently the instant case is not necessarily abated by the prior litigation."

In the case of State *ex rel.* Oshkosh, Algoma and Black Wolf Railroad Company *vs.* Burnell, Circuit Judge, 104 Wisconsin, 246, relator, a passenger-carrying corporation, condemned a strip of land for right-of-way purposes across the right of way of the Chicago & Northwestern Railway Company, who appealed from the order of the condemnation commissioners to the Circuit Court for Winnebago County and applied for and obtained an order restraining the petitioner from putting in the crossing until the appeal was heard. The restraining order required the giving of an undertaking in the sum of $5,000. Upon hearing, the C. & N. W. moved to dismiss the petition for jurisdictional reasons, and the motion was overruled. It then refused to put in testimony. Judgment dismissing the appeal and dis-

solving the injunctional order was rendered. The C. & N. W. then moved the court for a continuance of such order pending the appeal, and the same was granted upon an undertaking in the sum of $15,000 being furnished. The undertaking furnished was conditioned that should judgment or any part thereof be affirmed appellant should pay all costs and damages which might be awarded against it and all which the said O. A. & B. W. R. R. Co. might sustain by reason of a continuance of the injunctional order. O. A. & B. W. R. R. Co. then applied to the Circuit Court for an order fixing the sum and effect of an undertaking to be given by it to abide and perform any final judgment which should be rendered in favor of the C. & N. W. Rwy. Co. upon its appeal and for an order vacating and dissolving the injunctional order already entered. The court refused to vacate the injunctional order or to approve undertaking because of the grave character of the questions involved in the main case. Petitioner then moved for a writ of assistance, which was refused. Mandamus was then asked of the Supreme Court directing circuit judge to grant a writ of assistance to put relator in possession of right of way across C. & N. W. tracks. After stating view of the circuit judge with reference to questions in the main case the court said:

> "The questions here presented are quite important to the public at large as well as to the corporations themselves. The multiplication of grade crossings over important railway lines is not desirable. No urgent necessity appears why the crossing should be put in until the litigation is terminated and the right to a crossing finally determined. The C. & N. W. Rwy. Co. has given a sufficient undertaking to protect the petitioner from loss in case it should be finally determined that petitioner is entitled to a crossing. * * * We cannot say, upon the papers before us, that it is plain, that it was the duty of the court to award a writ of assistance, nor can we say that there is any emergency calling for immediate action, or that the remedy by appeal or writ of error is not

> entirely sufficient. The questions involved here deserve the careful consideration which they will receive upon hearing of the appeal upon the merits but cannot well receive upon a summary proceeding of this nature."

While the Supreme Court of Wisconsin, in the case last above cited, refused to grant the mandamus, it is apparent that the court recognized the law applicable to mandamus proceedings when arising during the pendency of other litigation involving the facts in issue. In the case at bar the Supreme Court of Michigan had before it a petition for mandamus, alleging great, if not irreparable, loss to petitioner, if the order of the commission was not summarily put into effect (Record, pages 3 and 4). It had before it a situation where the danger of loss was so great that the Fletcher Paper Company had offered to secure the D. & M. Rwy. Co. against loss by filing a bond sufficient in amount to cover the cost of relaying the branch (Record, page 3). The plaintiff in error, unlike the C. & N. W. Rwy. Co. in the Wisconsin case, had furnished no undertaking that would, in any way, save defendant in error from loss. The relief asked for by the Fletcher Paper Co. in the mandamus proceeding was not identical with that asked for in the petition to the Michigan Railroad Commission. In the latter it was requested that the plaintiff in error be required to relay the rail removed and operate the branch as part of its system. In the former it was requested that the railroad be compelled to put into effect the order of the commission until there had been a final determination of the controversy in the suit then pending.

The defendant in error was required to furnish a bond in the sum of $10,000 to protect the plaintiff in error from possible loss, and such bond was furnished. So that the exact situation before the Supreme Court of the State of Michigan in the mandamus proceeding was the danger of irreparable loss on one side, with no security to protect in case of such

loss, and on the other an offer by the petitioner to insure against loss if the order of the commission was made effective.

The Supreme Court of Michigan, in the case of Michigan Railroad Commission *vs.* Michigan Central Railway Co., 159 Mich., 580, had determined "that an order of the Railroad Commission is enforcible, although a proceeding in equity to review it is pending," and in that case, at page 580, used the following language:

> "The fact that the case is now in this court upon an appeal from such decision does not, in our opinion, affect the question of the application of the statute. In fact, the prospect of a term of years elapsing before a final determination of the questions raised is a cogent reason why the legislature provided that the order should be effective during such delays."

Act 300 of the Public Acts of 1909 of Michigan, under which the Michigan Railroad Commission was organized and under which the Commission proceeded in the instant matter, provides:

> "Sec. 25. All * * * regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie*, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act or until changed or modified by the commission as provided for in section 24 of this act."

Again, sec. 22-A:

> "If upon such investigation, the * * * regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor such * * * classification, regulation, practice or service as is or are just, reasonable and adequate * * * and shall make an

> order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof * * *."

Again, sec. 26-B:

> "No injunction shall issue suspending or staying any order of the commission, except upon application to court in chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon:"

Again, sec. 26-E:

> "In all actions under this section the burden of proof shall be upon complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable as the case may be."

Thus the legislature provided that the orders of the commission in cases of this kind should take effect promptly and be obeyed pending any litigation pertaining to their validity, unless the courts should, after hearing and notice, suspend the operation of the order.

It is also apparent from the above quotation that the Michigan Railroad Commission has been delegated the authority to deal with matters of discrimination by common carriers generally, and we contend that inasmuch as the "Tubbs Branch" had been operated by plaintiff in error as part of its general system under a printed tariff filed with the Michigan Railroad Commission, it was not competent for plaintiff in error to discriminate against the Fletcher Paper Co. by removing a portion of the track in question and suspending service on the branch without notice or without a canceling of the tariff in the manner provided by

law. It is not permissible under the laws of Michigan to cancel a tariff in the manner attempted by plaintiff in error, namely, by eliminating the branch from a station list (Record, page 10). We therefore contend that a railroad company cannot, in violation of statutory provisions, suspend service in the manner here attempted and then insist upon the same procedure as would be required in issuing an order for the granting of a new or additional service. In other words, it is within the province of the courts of Michigan to prevent the loss or destruction of property by the arbitrary and unwarranted acts of public service corporations, especially where in preventing such loss the procedure adopted includes a provision requiring the giving of security to prevent possible loss upon the part of the common carrier.

We respectfully submit that the order of the Michigan Supreme Court granting a writ of mandamus should be affirmed.

Respectfully submitted.

GRANT FELLOWS,
Attorney General of Michigan;
DAVID H. CROWLEY,
Assistant Attorney General of Michigan,
Counsel for Defendant in Error
Michigan Railroad Commission.